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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. _____

S. LAMONT SMITH, WARDEN,
GEORGIA STATE PRISON,

Petitioner,

v.

JACK HENRY SMITH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, S. Lamont Smith, Warden, Georgia State Prison, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 14, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendices hereto as Appendix A. The opinion of the Court of Appeals upon the petitioner's motion for rehearing and suggestion for rehearing *en*

banc, not yet reported, appears in the Appendices hereto as Appendix B. The opinion of the District Court, reported at 321 F. Supp. 482, appears in the Appendices hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 14, 1971. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on February 1, 1972, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the traditional, longstanding Georgia jury instructions regarding alibi, considered in the context of the instructions in their entirety, have the effect of shifting to the defendant the burden of persuasion on an essential element of the crime charged, thereby relieving the prosecution from proving every element of the offense beyond a reasonable doubt and impairing the presumption of innocence with resulting deprivation of due process of law.

2. Whether the initial decision on the constitutionality of the traditional, longstanding Georgia alibi charge should be applied retroactively to a convicted State prisoner who challenges such jury instructions for the first time in a federal collateral attack on the conviction.

STATUTORY PROVISIONS INVOLVED

Ga. Code § 38-122 (1933):

38-122 (1018 P.C.) Alibi as a defense.—Alibi,

as a defense, involves the impossibility of the accused's presence at the scene of the offense at the time of its commission; and the range of the evidence, in respect to time and place, must be such as reasonably to exclude the possibility of presence. (59 Ga. 142; 65 Ga. 756; 64 Ga. 344.)

STATEMENT OF THE CASE

The respondent, Jack Henry Smith, and an accomplice were jointly indicted and separately tried for the offense of armed robbery (robbery by use of an offensive weapon), the accomplice being tried first.[1] The case was tried before a jury on May 8, 1968 resulting in a verdict of guilty with a recommendation to the mercy of the court.[2] In accordance with the recommendation of the jury, sentence was set at a term of ten years.

At the trial, the respondent-defendant contended for the impossibility of guilt based upon his presence at a place other than the scene of the crime (Atlanta, Georgia), in this case, Dallas, Texas. Three alibi witnesses, allegedly named Ronald Chica, Ruby Scott and Elaine Kennedy, testified as to the then-defendant's presence in Texas. The inmate took the stand himself and made an unsworn statement in line with the testimony of the three witnesses. In rebuttal, the State read into evidence the inmate's own testimony at the previous trial of his accomplice, which previous sworn testimony had been

---

[1]Because both the respondent and the petitoner are named Smith, proper-name references cannot help but to confuse. The petitioner will be referred to as the warden. The respondent will be referred to as the inmate.

[2]The State did not insist on the death penalty with the result that the jury, upon a finding of guilty, had no choice but to recommend mercy.

elicited by defense counsel for the purpose of establishing an alibi for the accomplice. There were substantial and irreconcilable differences between the inmate's previous sworn testimony on the one hand and his unsworn statement and the testimony of his three alibi witnesses on the other. In the interim following their testimony, the three alibi witnesses disappeared from the vicinity of the courtroom and their whereabouts then and thereafter remain a mystery. The State did introduce evidence for the purpose of showing that the first alibi witness gave a false address and occupation.

The criminal trial court charged the jury as follows:

> "He contends and sets up in his defense under the law what is known as an alibi and I charge you alibi as a defense involves the impossibility of the accused's presence at the scene of the offense at the time of its commission and the range of the evidence in respect to time and place must be such as reasonably to exclude the possibility of presence. Alibi as a defense must be established to the reasonable satisfaction of the jury and must be such as reasonably to exclude the possibility of the presence of the defendant at the scene of the offense at the time of its commission. When so established to the reasonable satisfaction of the jury, the jury should acquit. Any evidence in the nature of an alibi should be considered by the jury in connection with all other evidence in the case and if in doing so the jury should entertain a reasonable doubt as to the guilt of the accused they should acquit.
>
> "The law of alibi consists of two branches. The first is to overcome proof of guilt strong enough to exclude all reasonable doubt, the onus is on the accused to verify his alleged alibi, not beyond reasonable doubt, but to the reasonable satisfaction

> of the jury. The second is that, nevertheless, any evidence whatever of alibi is to be considered on the general case with the rest of the testimony, and if a reasonable doubt of guilt be raised by the evidence as a whole, the doubt must be given in favor of innocence.
>
> "I charge you that if the facts in evidence and all reasonable deductions therefrom present two theories, one of guilt and the other consistent with innocence, the justice and humanity of the law compel the acceptance of the theory which is consistent with innocence."[3]

The inmate, upon conviction and sentence, was assigned to the State Board of Corrections for the purpose of carrying out the sentence imposed by the original trial court. The Board assigned the inmate to the custody of the warden, the petitioner herein, for incarceration pursuant to the court's judgment. Thereafter, the inmate brought a petition for a writ of habeas corpus in the Superior Court of Tattnall County. He alleged that his incarceration was illegal in that the judgment of conviction was invalid for the reason that the original trial court, in instructing the jury, had failed to observe constitutionally protected due-process minimums. The Superior Court, relying upon a now-overturned decision of the Georgia Court of Appeals, granted the writ, held an evidentiary hearing, and entered an order declaring invalid the warden's restraint for the reasons contended. Upon appeal, the Superior Court's judgment was reversed. *Smith, Warden v. Smith,* 226 Ga. 748 (1970).

The inmate then petitioned the District Court for a writ of habeas corpus. Subsequently, following oral argument, the District Court entered an order declaring

[3]The charge is set out in its entirety as Appendix E to this petition.

invalid the State-court sentence of conviction and purporting to limit the State's right of retrial to a ninety-five day period. At the time of the District Court's order, Smith's whereabouts were unknown, Smith having been effectively enlarged upon his own recognizance by an order of the District Court. Smith was ultimately arrested in Florida and charged with various felonies committed during the period of his enlargement. He subsequently escaped Florida confinement, was recaptured, convicted, and is presently serving Florida sentences in the Florida correctional system.

The warden appealed the decision of the District Court to the Court of Appeals for the Fifth Circuit. Following oral argument, the judgment for which review is now sought was rendered.

REASONS FOR GRANTING THE WRIT

The issuance of a writ of certiorari to review the decision of the court below is sought upon the cumulative bases of (1) the conflict between the Courts of Appeals for the First Circuit and the Fifth Circuit upon an important question of federal constitutional law, (2) the deepening and irreconcilable conflict between the Supreme Court of Georgia and the United States Court of Appeals for the Fifth Circuit upon an important state question controlled by federal constitutional law, (3) the misconception and misapplication of a decision of this Court by the court below in arriving at its decision, (4) the extremely large number of convictions of all grades of offenses over a period of almost ninety-eight years which the decision of the court below calls into question, and (5) the incorrect determination by the court below of an important principle of federal constitutional

law. Review and determination by this Court at this time will preterminate many potential applications for review in the foreseeable future.[4]

I.

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT CONFLICTS WITH A DECISION OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT ON THE SAME CONTROLLING PRINCIPLE OF FEDERAL CONSTITUTIONAL LAW.

In *Sullivan v. Scafati,* 428 F.2d 1023 (1st Cir. 1970), a Massachusetts inmate collaterally attacked his state-court conviction upon the theory that an apparently traditional Massachusetts charge on the law of alibi violated his federally protected constitutional right to due process. The charge in question characterized proof of the alibi defense as follows:

> ". . . [B]ecause without attempting to control or rebut the evidence of facts sustaining the charge, it attempts to prove affirmatively another fact wholly inconsistent with it; and this defense is equally available, if satisfactorily established, to avoid the force of positive, as of circumstantial evidence." *Id.* at 1024, n.2.

The habeas-corpus applicant relied specifically upon the cases arising out of state convictions in Iowa. *Johnson v. Bennett,* 386 F.2d 677 (8th Cir. 1967), vacated and remanded, 393 U.S. 253 (1968), on remand, 414 F.2d 50 (8th Cir. 1969), and *Stump v. Bennett,* 398

[4]A list of known cases involving the same issues and their status at the time of preparation of this petition, is set out in Appendix F to this petition.

F.2d 111 (8th Cir. 1968), cert. denied, 393 U.S. 1001 (1968).

The First Circuit characterized the language of the alibi instruction as simply describing "a logical truism which the fuller context explains: the prosecution's case may be attacked by directly rebutting the facts alleged or by showing *affirmatively* the occurrence of another set of facts inconsistent with the facts alleged, which latter course is commonly called alibi." *Sullivan v. Scafati, supra* at 1026. (Emphasis added.) The First Circuit apparently found no difficulty in the Massachusetts requirement that the alibi be "satisfactorily established".

The Georgia alibi charge fits clearly within the rationale of the decision of the First Circuit. While it differs from the Massachusetts charge in several respects, it is actually a more close parallel of the First Circuit's reasoning than is the Massachusetts charge. In fact, the First Circuit's discussion of the two pronged effect of alibi evidence was specifically enumerated as such in the Georgia charge. This portion of the charge is set out in the statement of the case in this petition.[5] Additionally, the Georgia charge did not contain the statement concerning the rigid scrutiny to which alibi evidence should be subjected.[6] Considered as a whole, the Georgia charge was far more favorable to the alibi defendant than the Massachusetts charge approved by the First Circuit.[7]

[5]The Georgia charge is set out in its entirety as Appendix E to this petition.

[6]"The defense of alibi is often a defense attempted by contrivance, subornation, and perjury. The proof, therefore, offered to sustain it, is to be subjected to a rigid scrutiny. . . ." *Sullivan v. Scafati,* 428 F.2d 1023 (1970).

[7]The most notable vice in the Georgia alibi charge is its tendency to over-emphasize and over-instruct the jury on the alibi question.

There is no illusion to the conflicting decision in the opinion below, despite the fact that the case was discussed during oral argument upon the court's specific inquiry regarding it.

In arriving at its conflicting decision, the First Circuit placed significant emphasis upon the absence from the Massachusetts charge under attack of what had apparently at one time been a standard Massachusetts rule to the effect that the proof of the alibi should "outweigh the proof that he [the alibi defendant] was at the place where the offense was committed. . . ." *Sullivan v. Scafati, supra* at 1024. This absence of the burden-shifting evidence-comparing standard will be discussed later in this petition under that portion of the reasoning which relates to the misapplication of the decisions arising out of Iowa.

Counsel for the petitioner recognizes that conflicts between decisions of the circuits, standing alone, may not be sufficient to compel this Court to exercise its discretionary jurisdiction. However, in the instant case the decisions are separated by less than two years in time of rendition and are diametrically opposed. Both purport to construe the same controlling Supreme Court authority, and, in so doing, reach opposite results. These factors, coupled with the matter discussed in subparts II and III below and the vast number of state convictions in Massachusetts and Georgia affected by the conflict in the decisions, would seem to compel the exercise of jurisdiction by this Court for the purpose of achieving uniformity of application of a principle of constitutional law.

II.

THE DECISION OF THE COURT BELOW IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH A SERIES OF CONTEMPORARY DECISIONS OF THE SUPREME COURT OF GEORGIA ON THE SAME PRINCIPLE OF FEDERAL CONSTITUTIONAL LAW.

The decision of the Court of Appeals is in conflict with the decision of the Supreme Court of Georgia on the same principle of federal constitutional law. *Thornton v. State,* 226 Ga. 837 (1970). Each of these decisions, in turn, has spawned a series of decisions.[8]

The conflict is squarely drawn and irreconcilable.

> "Under decisions of this court exemplified by *Chaffin v. State,* 225 Ga. 602 (170 S.E.2d 426), and *Young v. State,* 225 Ga. 255, 258 (167 S.E.2d 586), this charge was not error. Such charge, when considered with other portions of the charge on alibi as well as the parts of the charge dealing with presumption of innocence, burden of proof, etc., did not have the effect of shifting the burden of proof to the defendant to prove alibi by a preponderance of the evidence. Such charge is distinguishable on its face from the charges in *Johnson v. Bennett,* 393 U.S. 253 (89 S.C. 436, 21 L.E.2d 415) (opinion on remand, 414 F.2d 50 (8th Cir. 1969)); and *Stump v. Bennett,* 398 F.2d 111 (8th Cir. 1968)." *Thornton v. State,* 226 Ga. 839.

In light of the clear-cut difference in the decisional authorities, there is no predictable probability that the conflict will be resolved as a result of future cases in either court. The present case clearly defines the issue and delineates the conflict. It represents an excellent vehicle for resolving this particular conflict.

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[8]See cases listed in Appendix F to this petition.

If this application for a writ of certiorari is not granted and review had, this Court will in all probability continue to receive applications for writs of certiorari involving the same issue over the predictable course of the future.[9] Certainly, the number of applications for federal habeas-corpus relief based upon the decision in the court below will greatly increase. The conflict between the two judicial systems resulting from the exercise of federal habeas-corpus jurisdiction in the case of state prisoners will be further deepened.

Since the present conflict will continue to have future consequences, and as these consequences will continue to touch upon this Court's jurisdiction and the relationship between the federal and state courts, this Court is respectfully urged to grant certiorari for the purpose of reviewing the decision of the court below with a view toward resolving the conflict that presently exists.

III.

THE DECISION MISCONCEIVES, MISCONSTRUES AND MISAPPLIES A DECISION OF THIS COURT ON A VITALLY IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW.

The importance of the issue can be gauged by several concrete factors. The large number of pending cases bear testimony to the importance of this issue in the administration of criminal law.[10] Further, it does not take much

[9]Cases are continuing to reach the Supreme Court of Georia on direct appellate review which involve the same issue. *Sawyer v. State*, Ga. No. 27069, assigned for oral argument March 14, 1972. These cases are in addition to the numerous applications for collateral review presently pending in state and federal courts. See Appendix F hereto.

[10]See cases listed in Appendix F to this petition.

imagination to recognize that the overturning of a principle of one hundred years' utilization will necessarily affect a large number of convictions. The actual number of potential cases in this second category cannot be stated with any degree of accuracy. Certainly they number in the hundreds, perhaps even in the thousands.

It is this importance coupled with the conflicts outlined as reasons I and II above which has led the petitioner in the interest of the State of Georgia and the administration of its system of criminal jurisdiction to request the Supreme Court of the United States to exercise its discretionary jurisdiction and to review the errors committed below in the application of federal constitutional principles and previous decisions of this Court. Certainly, the vast reach of the decision of the court below would seem to have mandated a more thorough and deeper probing of the issues which the original appeal presented.[11]

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[11]In its original opinion the court disposed of the retroactivity issue by indicating that Smith's conviction occurred in 1969. It was clear from a reading of the record that Smith's conviction occurred in 1968, and there was absolutely nothing in the record to indicate otherwise. The court's summary disposition of the retroactivity issue was based upon an absolute and unjustified error of fact.

The court below made no effort to distinguish, reconcile or criticize the decision of the First Circuit in *Sullivan v. Scafati,* 428 F.2d 1023 (1st Cir. 1970). Certainly, in a case of this importance it would seem that a contrary decision in another circuit would merit some consideration and discussion. Of course, decisions of the First Circuit are not binding upon the Fifth Circuit; however, it is somewhat superficial to believe that the conflict would be alleviated by simply ignoring it.

The court below utilized its decision in this case to reverse three decisions arising out of the District Court for the Middle District of Georgia. Nevertheless, the court below made no effort to even discuss these decisions in the instant case or to acknowledge the existence of a basic conflict between the district courts.

STUMP V. BENNETT ANALYZED

The court below expressly based its holding upon the decision of the Eighth Circuit in *Stump v. Bennett*, 398 F.2d 111 (8th Cir. 1968), cert. denied, 393 U.S. 1001 (1968). It is essential, prior to an analysis of the Georgia alibi charge, to consider the question before, and the precise holding of, the Eighth Circuit when the Iowa alibi charge was before that court.

At the outset, it is important to recognize the caution with which the *Stump* court undertook to hold state-court jury instructions up to constitutional scrutiny. The *Stump* opinion was rendered with the underlying qualification that the Constitution does not control the various states in the development of procedural and evidentiary rules; generally, only oppressive and arbitrary state procedural rules command federal review. *Stump v. Bennett, supra,* at 114.[12] The fact that there might have been dis-

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The court did not touch upon numerous arguments of counsel in brief and orally reiterated discussing the elementary point upon which the decision of the court below should have turned, whether the instruction created in the minds of the jurors the impression that the defendant had the burden of establishing his nonpresence at the scene of the crime. Rather, the court got into a rather complex discussion of previous appellate case law in the State of Georgia for the purpose of establishing that there was a technical meaning to the charge which brought it within the purview of the Iowa decisions irrespective of the fact that the language was extremely different. This ignored the salient argument that the court was being requested to consider the constitutionality of a charge to a jury which should be considered for its plain-meaning effect upon the jurors and not with regard to technical, legally abstract principles. Certainly, the proposition that the court was simply instructing the jurors to do what they would do even in the absence of such instruction merited some consideration by a court which would overturn by its decision numerous convictions.

[12]The same general rule has been announced and emphasized by the Fifth Circuit. See also *Higgins v. Wainwright*, 424 F.2d 177, 178 (5th Cir. 1970). Here again, the court below failed to con-

agreement with Iowa's treatment of defense's raising alibi and the additional fact that most jurisdictions did not treat the matter in the same way was simply not before the *Stump* court as a constitutional issue.

What the *Stump* majority considered so oppressive as to deprive a defendant of due process of law was their conclusion that the instructions created a presumption of guilt which quite naturally favored the prosecution. Conversely, the Iowa charge, taken as a whole, caused the jury to believe that if the defendant did not persuade them, by a preponderance of the evidence, that his alibi was true, *then they must believe the prosecution's evidence on the element of presence.* One quoted passage from the Eighth Circuit's opinion summarizes this position:

> "The vital prejudice here is that the instruction compels the jury to believe the state's evidence relating to the defendant's presence at the scene of the crime, *unless the defendant is able to overcome its effect by preponderating proof.* Thus, as Justice Adams early noted in dissent against the rule in *State v. Hamilton,* 57 Iowa 596, 11 N.W. 5, 6 (1881), the 'true doctrine under such rule would seem to be that the evidence of guilt is aided by presumption of guilt, if the evidence of innocence relied upon is the evidence of alibi.' " *Stump v. Bennett, supra,* at 119. (Emphasis added.)[13]

---

sider and discuss its own precedent in holding the Georgia alibi charge up for an academic, theoretical review in accordance with legal opinions not available to the juries to which such instructions are in the normal course of the administration of criminal law daily tendered.

[13]The Eighth Circuit pointed to and stressed the fact that the Iowa jury had been instructed in the following language:

> " '. . . *before you can acquit the defendant by reason of*

In Iowa the State did not have to prove the element of presence beyond a reasonable doubt; rather, the element was in the case by way of the defendant's burden of persuasion on the negative averment of non-presence.

CONSIDERATION OF GEORGIA ALIBI CHARGE IN LIGHT OF *STUMP V. BENNETT*

The *Stump* decision can only be cited for the proposition that when instructions require the defendant to persuade the jury by a preponderance of the evidence on the issue of alibi, and where the specific language used requires the jury to accept without further consideration the prosecution's evidence on presence, an irrational presumption of guilt is created, and, as a consequence, the defendant is deprived of due process of law. A comparison of the *Stump* instructions with those in the instant case establishes the complete absence of the *sine qua non* to holding the charge unconstitutional; specifically, Smith's charge does not relieve the State of proving the element of presence beyond a reasonable doubt.

To begin the comparison, there is a critical difference between the phrase "establish it by a preponderance or greater weight of the evidence"[14] and "not beyond a reasonable doubt, but to the reasonable satisfaction of the jury." The disposition of this obvious difference in

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this defense [alibi] you must find that he has established it by a preponderance or greater weight of the evidence bearing upon it.' " *Stump v. Bennett, supra* at 115. (Emphasis in original text.)

[14]The charge considered in *Stump v. Bennett,* 398 F.2d 111 (8th Cir. 1968), cert. denied, 393 U.S. 1001 (1968), is found in footnote 5 on page 115 of the reported *Stump* decision. Future references to the charge will be made without specific reference to this source.

wording in the case under review (stating that any burden assumed by defendant with respect to an alibi defense renders a conviction unconstitutional), simply does not reach the constitutional question under consideration. As a matter of fact, the court in *Stump* prior to embarking on its extended analysis of the Iowa alibi procedure and prior to concluding that the same procedure transgressed constitutional protections, rejected the reasoning upon which the court below turned its decision that Georgia's long-standing approach was unconstitutional. Compare *Stump v. Bennett, supra* at 113 with *Smith v. Smith,* slip opinion at p. 16.

Perhaps the best analysis of the Georgia decision following the rationale of the *Stump* court was by the District Court for the Middle District of Georgia.

> "It [the alibi instruction] made it clear to the jury that alibi could be established to the 'reasonable satisfaction of the jury' and thus was not required to be established either beyond a reasonable doubt or by a preponderance of the evidence. The defense of alibi, upon negativing and rebutting the state's proof of presence at the scene of the crime, is really more than that in that it is an attempt by a defendant to prove that he was elsewhere and specifically where else he was. This is an undertaking on the part of the defendant and since it is his undertaking it may well be questioned whether he is harmed at all by an instruction that it is his onus or his burden to prove what he proposes to prove. Of course, it would be an error of constitutional proportions to charge a jury that if he failed in that proof he must be convicted, but the charge complained of contains no such intimation." *Hiatt v. Smith,* M.D. Ga., Civil Action 2661 at p. 6, rev'd. citing instant case, _____ F.2d _____ (5th Cir. 1972), application for cert. pending.

The most fundamental distinction, then, between the Iowa and Georgia charges lies not in the different measures of persuasion, but in the effect each has in causing the jury to require that the State prove the defendant present beyond a reasonable doubt.

COMMON SENSE AND SENSIBILITY

Considering the actual issue involved in this proceeding, there are several essential and determinative distinctions between the charge considered in *Stump* and the traditional Georgia alibi charge now before this Court for review. First, the use of the word "preponderance" is harmful not because it traditionally deals with evidentiary burdens of persuasion, but because it causes to be brought together the State's and the defendant's evidence for the resolution of conflicting facts. The word "preponderant", to any juror, connotes a greater or superior weight, and generally the only evidence in any criminal case over which the alibi evidence can preponderate is the prosecution's evidence on presence. In this sense, the Iowa jury was compelled to believe the State's evidence on presence, without determining if it was established beyond a reasonable doubt, for having determined the defendant's evidence on non-presence could not outweigh the State's case on presence, the jurists naturally accepted the latter evidence as true. *Stump v. Bennett, supra* at 119.

By comparison, the phrase "reasonable satisfaction" does not have the effect condemned in *Stump*. The standard used in Georgia only calls upon the jury to consider the defendant's evidence on non-presence and does not cause the jurors to resolve the alibi evidence with or against any other evidence in the case. The jury is simply

told that if the defendant's evidence on his whereabouts at the time the crime was committed satisfies them, then they *must acquit*. This is their obligation notwithstanding any evidence introduced by the State on presence or any other evidence in the case. It is only in the next paragraph, in the instruction before this Court, that non-presence is tied in with the general issue of a denial of every element of the crime charged. At this point, the jury is properly instructed that:

> "[I]f the showing as to alibi has not been such as to show to your reasonable satisfaction that the defendant was elsewhere at the time of the alleged commission of the alleged offense, any showing whatever of alibi is to be considered by you in the general case with the rest of the testimony and the defendant's statement; and if a reasonable doubt of guilt be raised by the evidence as a whole, including the showing as to alibi, the doubt must be given in favor of innocence and the defendant should be acquitted."

What the Georgia trial courts traditionally instruct the jury is nothing less than a restatement of the dictates of ordinary common sense. It goes without reiterating that a jury, even without instructions, is going to require that any alibi, to be accepted as such, be proven to its reasonable satisfaction. This is a fact inherent in the concept of the jury system and the trial of facts by a jury of peers. This fact of stark reality cannot be swept under the rug by decisions of courts couched in constitutional language but turned upon theories so abstract and academic as to defy the comprehension of the ordinary reasonable man. It seems a somewhat dubious process to invalidate otherwise valid convictions because the jury was instructed as to the obvious.

"BEFORE YOU CAN ACQUIT"

Apart from the consequence which may be attributed to certain words in causing a jury to resolve the evidence of non-presence with that of presence, an obvious distinction between the two charges lies in the significance placed by each state on the success or failure of a defendant to persuade a jury as to the truth of his alibi. The *Stump* majority considered the qualifying phrase "before you can acquit by reason of this defense" to be the Waterloo of the defensive arguments raised in the case. This phrase so conditions and qualifies the defendant's alibi evidence as to render it impotent if it be not strong enough to preponderate when compared with prosecution's evidence on presence. *Stump v. Bennett, supra* at 119, n. 6.

The harmful nature of these words is highlighted more when the second portion of the Iowa charge is considered. This next portion instructions the jury to consider the same evidence in an effort to determine whether or not it created a reasonable doubt as to guilt. In the Iowa case, however, the presence and use of the words "before you can convict" did little more than cause confusion and obvious, real inconsistency, thereby rendering the legal implication of the second portion meaningless:

> "The jury is told that before it can acquit the defendant by reason of this defense the defendant must establish it by the preponderance of the evidence. Yet the jury is also told that if *any* evidence creates a reasonable doubt as to the crime as a whole, then it can return a verdict of not guilty. This Court, of course, has consistently adhered to the general rule that instructions are to be viewed in their entirety. [Citations omitted.] But even when so viewed, the presence of serious confusion

> here as to the burden of proof seems inescapable. If we presume, as we must, that the jury follows the court's instructions, which instruction is the jury to follow?" *Stump v. Bennett, supra* at 116.

The charge before this Court does not employ language which causes a jury to attach such singular significance to the alibi evidence as to place the risk of jury doubt upon the defendant; rather, the language in the instructions does not foreclose the use of the evidence to effect an acquittal in another manner. Two instructions on the use of alibi evidence command acquittal when the alibi evidence does one of two things:

(a) Either reasonably satisfies the jury that he was elsewhere,[15] or

(b) Creates reasonable doubt in their minds as to guilt. This does nothing more than to present to the jury a logical clear progression of those things which the same evidence may do to demand an acquittal by a verdict of not guilty.

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[15]The beneficial aspect of this branch of the Georgia alibi approach is best expressed and explained in *Smith v. State,* 4 Ga. App. 807 (1908) (dissenting opinion). The jury is actually told that they may treat the defendant as a credible person and believe a fact, not a part of the prosecution's case, which the defendant purports to prove, and, necessarily establish his innocence. The approach suggested in *Smith v. Smith,* 321 F. Supp. 482. (N.D. Ga. 1970), was foreseen as early as 1908 and characterized by Judge Russell on the Georgia Court of Appeals as follows:

> "It reduces what the jury should consider as evidence in support of the manly and unequivocal assertion of innocence, — 'I am not guilty and can even prove my innocence,' into a pitiful plea for a Scotch verdict of 'not proven,' — into this statement to the jury: 'I may be guilty but the State has not shown it beyond a reasonable doubt.' " *Smith v. State,* 4 Ga. App. 807, 808-9 (1908).

The Eighth Circuit was properly concerned with the phrase "before you can acquit by reason of this defense" for it is of the type which tends to shift evidentiary burdens on elements of a case. Compare *Mann v. United States,* 319 F.2d 404, 408-10 (5th Cir. 1963) (considering a charge on willfulness, if the charge had not contained the words "so unless the contrary appears from the evidence" there would have been no error, considering the charge as a whole), with *Colson v. Cupp,* 318 F.Supp. 1381, 1383 (B. Ore. 1970) (absence of phrase "unless contrary appears from the evidence" rendered instructions neither misleading nor prejudicial). The burden-shifting qualifier is absent from the Georgia instruction, and it is this absence which frees the instructions from confusion and the possibility that the jury might misinterpret the legal principles involved.

The two distinctions just discussed amount to the difference between a charge which is constitutional and one which is not. Iowa, by using the word "preponderance" draws the *state's case on presence* into the jury's mind at the point where they are reaching a determination on the *only* way they can acquit by reason of the alibi defense. Georgia tells the jury that they *must acquit* if reasonably satisfied of the alibi, separate and apart from any other aspect of the case, and does not employ phraseology which forecloses the use of the defense in the determination of whether or not there is reasonable doubt as to guilt.

THE GEORGIA APPROACH ON ALIBI

The Georgia approach on alibi defense is not, as suggested by the court below, an illogical, contradictory treatment for what should be considered only as rebut-

tal evidence. The approach adopted by Georgia merely treats the three logical possibilities that are present when alibi evidence is introduced in criminal trials:

(1) The jury may believe it apart from any other evidence in the case, (2) The jury may disbelieve it entirely, or (3) They may do neither, but they may believe it enough to create a reasonable doubt as to guilt. These three possibilities stem from the fundamental character of alibi evidence: While the proof tends to rebut the element of presence charged in the indictment, at the same time it attempts to prove affirmatively another fact wholly inconsistent with it. The Georgia charge is designed to guide the jury with respect to this legal characterization of the defense. The only "burden" upon the defendant is to reasonably satisfy the jury on the "fact" of his whereabouts elsewhere, which he must do if he is to be acquitted on the basis of the evidence which, in one of its two aspects, has no bearing on the elements supporting the charge of the crime. If the defendant fails to satisfy the jury that he was at another, specific, identified location apart from the scene of the crime at the time of its commission, then the jury must still undertake an investigation of "all the evidence" and give the defendant the benefit of any doubt that exists as a whole. There is no language in the traditional Georgia instructions from which a juror could reasonably infer that if he is not reasonably satisfied as to the truth of the alibi evidence, he is compelled to accept the State's proof on presence without subjecting this latter evidence to the traditional measure of proof beyond a reasonable doubt. This, of course, was the failing of the Iowa charge.

While it may be that the Georgia approach does not conform with that of most other states, it still does not

reach the constitutional infirmity found in the Iowa charge. The treatment of the question necessarily varies from state to state, with the variations within the confines of the Constitution. See, e.g., *Bolin v. State,* 405 S.W.2d 768, 773 (Tenn. 1966), (jury instructed to receive alibi evidence cautiously for it is a defense that is easily manufactured or fabricated); *State v. Peetros,* 214 A.2d 2 (N.J. 1965) (alibi is not singled out for special instruction, for the evidence is only considered as direct denial of the charge) (consent, suggesting that failure to charge on alibi denies any probative value which attaches to the claim); *Commonwealth v. Bonomo,* 396 Pa. 222, 231, 151 A.2d 441 (1959) (holding that in the future the lower courts should not instruct the jury that the defendant must establish alibi with preponderance of evidence, but instruct only that it should be considered as creating reasonable doubt); *Commonwealth v. Sullivan,* 239 N.E.2d 5, 10 (Mass. 1969) (comment on evidence to the effect that alibi often is attempted by contrivance, subornation and perjury, and proof should be accepted with rigid scrutiny, sustained where it was clear that the prosecution must prove case notwithstanding alibi).

CHARGE AS A WHOLE

The final determination, as in any case where jury instructions are challenged, that must be made in this case is whether or not, considered as a whole, the charge does in fact deprive a defendant of the benefit of the presumption of innocence. Before examining the instructions and the degree to which they emphasize the prosecution's burden of proving each and every element of the offense charged beyond a reasonable doubt, two observations must be made with respect to the precedent relied upon

by the court below: (1) The point of departure between the majority opinion and the dissenting judges in the *Stump* case was solely on this point and (2) The court below did not consider this aspect of the issue. The process of holding one line from an entire charge out for constitutional examination, determining that there is some gossamer possibility of prejudice, and immediately dissolving the deliberate, first-hand determination of guilty by twelve jurors, has never been the practice of any court on review in a habeas-corpus proceeding. The alleged offensive language couched in this case simply cannot be taken out of context, but must be considered in light of the entire charge by the trial court. The Eighth Circuit, having determined that the Iowa charge actually removed the element of presence from the State's case, could not consider later instructions that the statements prove the "crime as a whole" in clearing the error in the case. *Stump v. Bennett, supra* at 122. Again, the significance of the phrase "before you can acquit by reason of this defense" is apparent.

While the instructions involved in this case speak for themselves as to the emphasis placed on the state's burden of proof and the further emphasis on the presumption of innocence in the defendant's favor, a brief summary of the charge should be helpful in pointing out the impossibility of any juror's believing that the defendant would in any way have to establish his innocence in order to obtain acquittal. Near the beginning, the following statement is made in no uncertain terms:

> "Upon arraignment the defendant, Jack Henry Smith, enters his plea of not guilty to the charge as made in the indictment and that makes the issue you are to pass upon in this case. The indictment is not evidence and it shall not be considered by

you as evidence. The only purpose it serves is to bring the charge against the defendant, Jack Henry Smith, into Court and that defendant enters upon the trial of his case with a legal presumption of innocence in his favor and that presumption goes with him throughout the trial and until the State removes it by evidence sufficient to convince your minds beyond a reasonable doubt of the defendant, Jack Henry Smith's guilt.

"The burden is, therefore, upon the State to prove all of the material allegations contained in the bill of indictment beyond a reasonable doubt before you would be authorized to convict the defendant on trial."

Immediately after charging the jury on the law of alibi and its two branches, the criminal trial court stated to the jury:

"I charge you where the facts in evidence and all reasonable deductions therefrom present two theories, one of guilt and the other consistent with innocence, the justice and humanity of the law compel the acceptance of the theory which is consistent with innocence."

If it can still be argued that Smith's jury stubbornly and without foundation believed the prosecution did not have to place Smith at the scene of the crime, beyond a reasonable doubt, the concluding remarks of the trial judge during his instruction and upon recharge should certainly have dispelled such an unwarranted assumption:

"Before you would be authorized to convict the defendant on trial, Jack Henry Smith, his guilt should be made plainly and manifestly to appear beyond a reasonable doubt and a reasonable doubt is a doubt that you can give a reason for. If you

have a reasonable doubt as to the defendant, Jack Henry Smith's guilt then that doubt must be resolved in favor of the defendant and it will be your duty to acquit him."

Particular instructions on alibi in this case, as expanded and clarified by the instructions which came before and particularly those which came after, places Smith's contentions within the realm of an arguable question concerning state procedure; it does not concern gross and egregious error touching 14th amendment protections. As in every other case before this Court concerning this issue, state convictions should not be set aside en masse where a challenge to the jury instruction, considered as a whole, is neither misleading nor prejudicial, and particularly where the matter has never been raised at trial on direct appeal.

THE RETROACTIVITY ISSUE

The court below refused to give meaningful consideration to the issue of retroactivity even though the conviction under collateral attack was obtained prior to the decision in *Stump v. Bennett;* however, the net effect of the decision was to apply the new decision retroactively despite the court below's disclaimer of this effect.

While it is presently impossible to state with absolute accuracy the number of Georgia convictions which stand to be affected and relitigated upon the decision of the court below, experience to date would indicate that by the most conservative estimate the figure will run into the hundreds, perhaps even into the thousands. The requisite finality of criminal procedures upon which effective crime deterrents and law enforcement so drastically depends will have been dealt yet another staggering blow. More importantly, the atmosphere of non-

finality with its attendant state-guilt will seriously undermine and impede the sociological plateau upon which correctional rehabilitation must necessarily commence—the recognition by the individual inmates that the conduct for which they are incarcerated is the result of their own, and not the state's wrong-doing. And to what end? Are the noble ideals of the Constitution properly served by judicial determinations that are at once both disruptive and piddling? The petitioner submits that they are not, and he is firm in his belief that this Court will so agree.

In light of the disasterous effects upon the administration of criminal justice, the decision of the court below applying retroactively its conclusions as to the Georgia alibi charge should be reversed with the question of prospective determination left to an appropriate case or controversy.

Considering the century-old reliance of the Georgia courts on their freedom to adopt evidentiary procedural rules which merely require a defendant to introduce sufficient evidence to "reasonably satisfy" the jury of the truth of the fact which the state obviously need not prove to convict, the very questionable and nebulous potential effect upon the fact-finding decision of the abstract examination of the instruction in question, and the rather obvious effect upon the administration of justice of a retroactive application of the rule, any new rule should only apply to cases tried after the initial decision on the constitutional issue. See *Tehan v. Shotte,* 382 U.S. 406 (1965); compare *Johnson v. Bennett,* 393 U.S. 253, 255 n.5 (1968), with *Johnson v. Bennett,* 414 F.2d 50 (8th Cir. 1969); see also *State v. Wisniewski,* 171 N.W.2d 882, 886-7 (Iowa

1969) (applying the *Stump* rule to cases still on direct review on the date of the federal decision).

CONCLUSION

The issues involved in this case have become a most troublesome and disruptive problem in the administration of criminal justice. The issue remains open as one of substantial importance in the administration of the criminal law. It is respectfully requested that this Court grant the writ of certiorari for the purpose of reviewing and reversing the decision of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served true and correct copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, by mail, by depositing the same in a United States mail box, with first class postage prepaid, addressed to each of the following, who constitute all counsel of record:

John McGuigan, Esquire
2311 National Bank of Georgia Building
Atlanta, Georgia 30303

This 7th day of March, 1972. All parties required to be served have been served.

COURTNEY WILDER STANTON

APPENDIX

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1311

JACK HENRY SMITH,

Petitioner-Appellee,

VERSUS

S. LAMONT SMITH, WARDEN,
GEORGIA STATE PRISON,

Respondent-Appellant.

Appeal from the United States District Court
For the Northern District of Georgia

(December 14, 1971)

Before THORNBERRY, MORGAN and CLARK,
Circuit Judges.

THORNBERRY, Circuit Judge: This is an appeal from the district court's determination on petition for habeas corpus that the Georgia alibi charge violates due process standards.

On March 12, 1969, petitioner was convicted by a jury of two counts of burglary. During the trial, peti-

tioner asserted the impossibility of his guilt based on alibi. Petitioner, along with three other witnesses, testified that he was in Dallas, Texas at the same time the crime was committed in Atlanta, Georgia. In rebuttal, the State introduced into evidence prior inconsistent statements by both petitioner and his alibi witnesses, along with other facts tending to discredit the witnesses' credibility. The issue of petitioner's presence at the scene of the crime was thus hotly contested at the trial.

The trial judge, in accordance with settled Georgia law,[1] charged the jury as follows:

> He contends and sets up in his defense under the law what is known as an alibi and I charge you alibi as a defense involves the impossibility of the accused's presence at the scene of the offense at the time of its commission and the range of the evidence in respect to time and place must be such as reasonably to exclude the possibility of presence. Alibi as a defense must be established to the reasonable satisfaction of the jury and must be such as reasonably to exclude the possibility of the presence of the defendant at the scene of the offense at the time of its commission. When so established to the reasonable satisfaction of the jury, the jury should acquit. Any evidence in the nature of an alibi should be considered by the jury in connection with all other evidence in the case and if in doing so the

[1]The Georgia law on the issue of alibi is provided by statute:

> Alibi, as a defense, involves the impossibility of the accused's presence at the scene of the offense at the time of its commission; and the range of the evidence, in respect to time and place, must be such as reasonably to exclude the possibility of presence.

GA. CODE ANN. § 38-122. *See also Moultrie v. State*, 93 Ga. App. 396, 92 S.E.2d 33 (1956).

> jury should entertain a reasonable doubt as to the guilt of the accused they should acquit.
>
> The law of alibi consists of two branches. The first is to overcome proof of guilt strong enough to exclude all reasonable doubt, the onus is on the accused to verify his alleged alibi, not beyond reasonable doubt, but to the reasonable satisfaction of the jury. The second is that, nevertheless, any evidence whatever of alibi is to be considered on the general case with the rest of the testimony, and if a reasonable doubt of guilt be raised by the evidence as a whole, the doubt must be given in favor of innocence.

The State contends that the Georgia charge, considered in its entirety, did not shift the burden of proving alibi to the defendant. Moreover, it argues that any possibility of prejudice was cured by the trial court's further instruction that the burden was on the State to prove beyond a reasonable doubt all essential elements of the crime, which necessarily included the element of presence.

Petitioner's due process contention depends primarily upon the application of a number of Eighth Circuit cases dealing with the Iowa alibi charge.

In the first applicable case, *Johnson v. Bennett,* 8th Cir. 1967, 386 F.2d 677, the Iowa court had charged the jury that the defendant had the burden to prove his alibi defense by a preponderance of the evidence. The trial court, however, had added:

> The evidence upon this point is to be considered by the jury, and if upon the whole case including the evidence of an alibi, there is a reasonable doubt of defendant's guilt, you should acquit him.

386 F.2d at 682.

The Eighth Circuit panel, finding no merit to defendant's due process contention, stated:

> . . . . [I]n other instructions the court stressed the presumption of innocence, reasonable doubt and the necessity of the State proving all essential elements of the case beyond a reasonable doubt. It is difficult to say on the basis of the instructions as a whole that the defendant was deprived of any substantial constitutional right.

386 F.2d at 682.

The Supreme Court immediately granted certiorari. *Johnson v. Bennett*, 390 U.S. 1002, 88 S.Ct. 1247 (1968). Before final determination of *Johnson*, however, the Eighth Circuit went en banc to consider *Stump v. Bennett*, 8th Cir. 1968, 398 F.2d 111, involving the same Iowa charge:

> Before you can acquit the defendant by reason of this defense [alibi] you must find that he has established it by a preponderance or greater weight of the evidence bearing on it.

398 F.2d at 115.

The Eighth Circuit, with the three members of the *Johnson* panel dissenting, found that the Iowa charge, in spite of the added reasonable doubt instruction, tended to burden the defendant with proving that he was not present at the scene of the crime. Such a burden of proof on an essential element of the crime was found to violate due process standards. The Court reasoned:

> By shifting the burden of proof to a person who claims to have been elsewhere at the time of the crime, there is created an irrational and arbitrary presumption of guilt. It arises not by reason of a proof of fact from which a fair inference might

be drawn but from the mere happening that the defendant offers testimony in an attempt to establish innocence. When this occurs, unless the defendant can succeed in overbalancing the state's evidence, the jury is expressly told he cannot be acquitted by reason of his sole claim to innocence. . . . [T]his presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. . . . [I]ncriminating presumptions are not to be improvised by the judiciary.

398 F.2d at 116.

Moreover, the Court went on to state:

Beyond violating petitioner's right to have the state assume the burden to prove (beyond a reasonable doubt) his presence at the crime, we think the Iowa instruction and its judicial application is patently offensive in other ways to the defendant's basic constitutional rights. . . . [O]nly when the defendant seeks to produce witnesses to corroborate his non-presence [does] the Iowa rule incongruously penalize him with the burden of persuasion as to his non-presence. . . . Thus an innocent person, whose only refuge of innocence may be proof of his non-presence and non-participation in the crime itself, must risk this greater burden because he tries to bring witnesses forward to substantiate his story. He must choose between the exercise of two constitutionally guaranteed rights. He must surrender either the right to offer corroborative evidence of his innocence or else his traditional right to have the state assume the burden of proving his guilt beyond a reasonable doubt. Under the Iowa rule he cannot have both. Such a procedure can have no other purpose than to "chill the assertion of constitutional rights by penalizing those who choose to exercise them. . . ." This is an impermissible burden.

398 F.2d at 120.

Shortly after *Stump*, the Supreme Court vacated *Johnson* for reconsideration in light of *Stump*. *Johnson v. Bennett*, 393 U.S. 253, 89 S.Ct. 436 (1968). On the same day, the Court denied certiorari in *Stump*. *Bennett v. Stump*, 393 U.S. 1001, 89 S.Ct. 483 (1968).

The Eighth Circuit, upon en banc consideration of *Johnson* in light of *Stump*, reversed the earlier decision of the *Johnson* panel and held there was no real factual distinction between the two cases. *Johnson v. Bennett*, 8th Cir. 1969, 414 F.2d 50. The court noted in passing:

> We have read with interest the many Iowa cases where the alibi instruction was under challenge. The very number of the cases, and the constant resubmission of the issue to the court, indicate the concern which the instruction has occasioned. Although the Iowa court has been unanimous in opinion in a large majority of its cases, the court was split in its early opinions and again has been split in the most recent ones. In the intervening unanimous opinions there are, nevertheless, some indications of struggle in the decisional process.

414 F.2d at 53.

We note a similar struggle in the decisional process of Georgia courts in dealing with the alibi charge at issue here.

Shortly after the Eighth Circuit decisions, the Georgia Appeals Court held the charge involved in the instant case unconstitutional on the basis of *Stump* and *Johnson*. *Parham v. State*, 120 Ga. App. 723, 171 S.E. 2d 911 (1969). The Georgia Supreme Court, however, in *Thornton v. State*, 225 Ga. 837, 178 S.E.2d 193 (1970), held the Georgia charge to be distinguishable

on its face from the Iowa charge and refused to follow *Parham*.

Earlier Georgia cases are often confusing and similarly irreconcilable in their interpretation, application, and assessment of the effect of the alibi charge.

The Georgia alibi doctrine was first enunciated in *Harrison v. State*, 9 S.E. 542 (Ga. 1889), wherein the Georgia Supreme Court approved the following charge:

> Well, now the next thing is as to the strength of the evidence of *alibi*, — what that evidence (considering the credibility of the witnesses, and what the witnesses testified to) amounts to. The law says that it must outweigh the evidence introduced on the part of the state, provided, as I have charged you, if the state's evidence is sufficiently strong, without more, to produce a conviction in your minds of the guilt of the prisoner beyond a reasonable doubt. In order to remove that, — the *alibi*, — *the testimony sustaining the* alibi, *in the judgment of the jury, should outweigh or preponderate over the evidence for the state.* (Emphasis added)

9 S.E. at 54.

Somewhat later, in *Bone v. State*, 30 S.E. 845 (Ga. 1897), the court again approved the charge with the following language:

> . . . . [T]he range of the evidence in respect to time and place must be such as reasonably to exclude the possibility of presence. The onus is on the accused to verify the alleged alibi, not beyond reasonable doubt, but to the reasonable satisfaction of the jury. . . . The charge of the court varied to some extent the language approved . . . as to the amount of proof required to establish the alibi. *There is no question as to the correctness of the*

> *charge as to where the burden rested, — it was with the defendants.* . . . Touching alibi, the rule in Georgia as established by authority consists of two branches. The first is that to overcome proof of guilt strong enough to exclude all reasonable doubt, the onus is on the accused to verify his alleged alibi, not beyond reasonable doubt, but to the reasonable satisfaction of the jury. The second is that, nevertheless, any evidence whatever of alibi is to be considered on the general case with the rest of the testimony, and, if a reasonable doubt of guilt be raised by the evidence as a whole, the doubt must be given in favor of innocence. Thus it will be seen that *the onus to establish the alibi is on the accused; that this is not to be established beyond a reasonable doubt, but to the reasonable satisfaction of the jury.* (Emphasis added)

30 S.E. at 847-48.

In speaking more specifically on the quantum of proof necessary to sustain the alibi defense, the court went on to state:

> The court in this case charged that the burden was on the accused to show their absence by a preponderance of the testimony. The preponderance of the testimony might or might not show the facts of the alleged alibi to the reasonable satisfaction of the jury. *Less than a preponderance might do so; more might not.* (Emphasis added)

30 S.E. at 848.

More recently, in *Porter v. State,* 200 Ga. 246, 36 S.E. 2d 794 (1946), the Georgia Supreme Court has sustained this interpretation of the charge. In *Porter* the court, citing *Harrison* and *Bone,* stated:

> The defendant by his statement and witnesses introduced in his behalf sought to establish an

alibi. "Alibi, as a defense, involves the impossibility of the accused's presence at the scene of the offense at the time of its commission; and the range of the evidence, in respect to the time and place, must be such as reasonably to exclude the possibility of presence." . . . The burden is on the accused to sustain his defense of alibi to the reasonable satisfaction of the jury *in order to overcome proof of his guilt of the crime with which he is charged.*

The jury was authorized to find that the defendant has not established his alibi, they being the judges of the credibility of the witnesses and of the weight to be given the defendant's statement, and that he had *not overcome the prima facie case made by the State under each count of the indictment, and accordingly to return a verdict of guilty as charged in each count.* (Emphasis added)

36 S.E. 2d at 799.

Periodic criticism of the charge involved here can be found throughout the instruction's stormy history. In *Bone v. State, supra,* the court noted:

. . . . [I]t would be logical, I think, that the facts of an alibi should come into the case like any other matters of defense, to be considered the same way, and affect the mind of the jury only as they believe the truth to be. Being a part of the evidence, these facts should be considered with the other evidence in the case, and, after due consideration of the evidence as a whole, the defendant should have the benefit of all reasonable doubt as to his guilt. However this may be, the law of this state is settled as above set out, and I follow as it is written.

30 S.E. at 848.

In *Smith v. State,* 3 Ga. App. 803, 61 S. E. 737

(1907), a Georgia Appeals Court refused to reverse a conviction in spite of the trial court's failure to give a reasonable satisfaction charge, holding it to be harmless error because of the charge's necessary includability into the reasonable doubt instruction. In so doing the court questioned the wisdom of such a charge in any case.

> As to the law governing the defense of alibi the decisions in this state recognize and in a measure uphold a plain, palpable incongruity. It is said that the burden of proving an alibi to the reasonable satisfaction of the jury rests upon the defendant. Yet the state must show the defendant to be guilty beyond a reasonable doubt, and if his proof tending to establish an alibi raises such a doubt he is to be acquitted; in other words, the state must show, as a part of the case, and must prove beyond a reasonable doubt, the defendant's presence, but the defendant must establish his absence to the reasonable satisfaction of the jury. *If it be conceded that absence and presence are absolute opposites, and that proof to the reasonable satisfaction of the jury is of a different degree from proof beyond a reasonable doubt, the logical absurdity of the proposition just announced is apparent.* Ordinarily we would be hesitant to call absurd any doctrine apparently recognized by our courts; but as to this proposition almost every judge of our Supreme Court who has had occasion to state the proposition has recognized the incongruity. (Emphasis added)
>
> * * * *
>
> . . . . [W]e will not reverse a judgment because the judge refuses to commit himself to an absurdity so manifest.

61 S. E. at 738-39. *See also* 11 ENCYCLOPEDIA OF GEORGIA LAW (EVIDENCE) § 138, at 379. Speak-

ing of earlier cases upholding the alibi charge, the court went further in stating:

> We would like to see these cases modified; "but, since correction lieth in those hands which made the fault we cannot correct." Whenever the point is fairly made, and a request to review these cases is properly submitted, we may certify the question to the Supreme Court, and we have no doubt that court will so review these decisions as to make the law relating to this subject plain and free from incongruity.

61 S. E. at 738.

We note some evidence that Georgia defendants are leery of the alibi charge and would prefer to waive all rights to any mention of alibi rather than submit to the "reasonable satisfaction" charge. In *Kitchens v. State,* 209 Ga. 913, 76 S. E. 2d 618 (1953), the defendant, after introducing alibi testimony, requested that no instructions concerning alibi be given. He wished instead to rely strictly upon the general "reasonable doubt" charge. The Georgia court, however, held the charge to be absolutely required after introduction of affirmative alibi testimony.

> . . . . Alibi, as a defense, involves the impossibility of the defendant's presence at the scene of the offense at the time of its commission, . . . and, as a matter of pleading, the defense of alibi is covered by the general issue of not guilty. . . . The accused, in his statement to the jury, denied being present at the scene of the robbery for which he was indicted, at the time of its commission, saying he left the place where the State contends the robbery occurred some two hours before it happened. He also denied any knowledge of or participation in the alleged robbery. He introduced testimony for the

> purpose of showing, and tending to show, that he was not present at the scene of the robbery, but was elsewhere at the time of its commission. In these circumstances, a charge on alibi was not only authorized by the defendant's statement, but *required* by his evidence. . . . A failure to have charged upon the subject of alibi in the case at bar would have been erroneous. (Emphasis added)

76 S.E.2d at 619.

The State contends, as did the Georgia Supreme Court in *Parham*, that the Iowa alibi charge, found to be constitutionally impermissible by the Eighth Circuit, is distinguishable on its face from the Georgia charge in two respects. First, the Iowa charge required a preponderance of the evidence on the alibi issue; whereas the Georgia charge only requires that the jury be "reasonably satisfied." Secondly, the Iowa charge was mandatory, *requiring* the jury to find no alibi in the absence of a preponderance of proof from the defendant; whereas Georgia gives its juries a "choice" between two burdens of proof.

We can see no significant distinction between the two charges. Although it is possible that the Georgia charge does not require a preponderance of the evidence, the fact of which even Georgia courts are not convinced,[2]

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[2]The quantum of proof required of the defendant is not clear. The defendant clearly is not required to prove his alibi beyond a reasonable doubt. *Hale v. State*, 110 Ga. App. 236, 138 S.E.2d 113 (1964); *Evans v. State*, 13 Ga. App. 700, 79 S.E. 916 (1913). There has, however, been some question in the past as to whether defendant must prove his alibi by a preponderance of the evidence. Several Georgia cases seem to place such a burden on the defendant. *Laminack v. State*, 187 Ga. 648, 1 S.E.2d 677 (1939); *Jones v. State*, 130 Ga. 274, 60 S.E. 840 (1908); *Cochran v. State*, 113 Ga. 726, 39 S.E. 332 (1901); *Bone v. State*, 102 Ga. 387, 30 S.E. 845 (1897); *Copeland v. State*, 33 Ga. App. 150,

we find the actual standard utilized to be immaterial. It is enough to say that it is clear that Georgia defendants have *some* burden on their alibi defense. *See Bone v. State, supra.* If this were not so, it would be difficult to discern any reason for the court's giving the charge in the first place. *See* GREEN, GEORGIA LAW OF EVIDENCE, § 21, at 75-77. No such burden can be sustained under our Constitution. Evidence of alibi should come into a case like any other evidence and must be submitted to the jury for consideration of whether the evidence as a whole on the issue of presence proves the defendant's guilt beyond a reasonable doubt. *See Falgout v. United States,* 5th Cir. 1922, 249 F. 513.

We likewise find the Georgia instruction to be no less mandatory than the Iowa charge. Georgia instructs, "Alibi as a defense *must* be established" to the jury's satisfaction; whereas Iowa charged, "Before you can acquit . . . by reason of this defense you *must* find" by a preponderance of the evidence. The difference in the obligation thus imposed is minimal at best, and the effect of the respective charges on the jury is most assuredly

125 S.E. 781 (1924). Some cases have held the placing upon a defendant the burden of proving his alibi by a preponderance of the evidence to be error. *Pritchard v. State,* 122 Ga. App. 780, 178 S.E.2d 808 (1970); *Moultrie v. State,* 93 Ga. App. 396, 92 S.E.2d 33 (1956). The most commonly accepted wording of defendant's burden is that "alibi must be established to the reasonable satisfaction of the jury." *Porter v. State,* 200 Ga. 246, 36 S.E.2d 794 (1946); *Eugee v. State,* 159 Ga. 604, 126 S.E. 471 (1925); *Harrison v. State,* 83 Ga. 129, 9 S.E. 542 (1889); *Johnson v. State,* 59 Ga. 142 (1877); *Lewis v. State,* 11 Ga. App. 102, 74 S.E. 708 (1912). Several cases seem to indicate that reasonable satisfaction of the jury and preponderance of the evidence are the same. *Bone v. State,* 102 Ga. 387, 30 S.E. 845 (1897); *Hale v. State,* 110 Ga. App. 236, 138 S.E.2d 113 (1964). More recent authority indicates that the two standards might be different. *Moultrie v. State, supra; Pritchard v. State, supra.*

identical. We hasten to point out that in both the Iowa and Georgia cases, the jury was further instructed to consider *all* the evidence, including that of alibi, in determining the guilt of defendants beyond a reasonable doubt. In both states, therefore, the jury had a "choice" of applying two conflicting burdens of proof. A jury may not, however, have such an option to ignore the reasonable doubt test on the issue of presence in a criminal prosecution. The Constitution, and more specifically the due process clause of the fourteenth amendment, permits of no such "choice."

We have little doubt that the Georgia charge, by affirmatively presenting such an option to the jury, caused confusion in the instant case and created a substantial likelihood of the jury's incorrectly placing the burden of proof on the petitioner much to his prejudice.[3] As noted by the Eighth Circuit in *Stump*, this Court cannot determine with precision where the jury in any particular case placed the burden of proof. This does not prevent this Court from using its collective common sense in the instant case. Accordingly, we must presume that prejudice resulted.

This Court recognizes that a criminal defendant is not entitled to a perfect trial under our Constitution. *Lutwak v. United States*, 344 U.S. 604, 73 S.Ct. 481

[3]In *Harrison v. State*, 9 S.E. 542 (Ga. 1889), the Chief Judge of the Georgia Supreme Court recognized this problem.

> It seems to us that, in the metaphysics of trial, there is great difficulty in distinguishing between reasonable doubt on the specific defense of *alibi* and reasonable doubt of guilt upon the whole case taken together. Where presence is necessary to constitute guilt, it seems that a reasonable doubt of presence would, by unresistible logic, involve reasonable doubt of guilt.

9 S.E. at 544.

(1953). Habeas corpus will not lie to challenge a jury charge in the absence of a clear denial of due process so as to render the trial fundamentally unfair. *Higgins v. Wainwright*, 5th Cir. 1970, 424 F.2d 177; *McDonald v. Sheriff of Palm Beach County, Florida*, 5th Cir. 1970, 422 F.2d 839. In light of these principles, there is yet no doubt that a shift in the burden of proof of an essential element of the crime does rise to constitutional proportions and renders the trial fundamentally unfair. The presumption of innocence and the harsh burden of proof placed on the State in criminal prosecutions are two of the oldest and most fundamental rights protected by our Constitution. *See, e.g., Coffin v. United States*, 156 U.S. 432, 15 S.Ct. 394 (1895). They purport to protect all citizens from the threat of punishment by mistake. They are therefore far too important and fundamental to be classified as less than constitutionally protected. *See Deutch v. United States*, 367 U.S. 456, 81 S.Ct. 1587 (1961); *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332 (1958); *Morrison v. California*, 291 U.S. 82, 54 S.Ct. 281 (1934); *Cummings v. Missouri*, 4 Wall. 277 (1866).

With all due deference to the State of Georgia and the charge used there since 1889, we cannot give constitutional sanction to a doctrine, no matter how ancient, which serves no useful function whatsoever and which creates the clear probability that a defendant may be deprived of one of our most cherished rights.[4]

Accordingly, we AFFIRM.

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[4]We dispose of this case on the basis of the series of Eighth Circuit cases decided in 1968 and the Supreme Court's resulting action. Although we recognize that there is ordinarily no precedential value in the Supreme Court's denial of certiorari, we cannot close our eyes to the clear implication of the Supreme Court's actions taken as a whole in regard to the Eighth Circuit cases. We think it patently obvious that the Supreme Court, as of 1968, approved the holding of the Eighth Circuit that the Iowa charge, found to be indistinguishable from that involved in the instant case, could not be sustained. This disposition renders inapplicable the issue of retroactivity raised by the State to this 1969 conviction.

The State raises two further objections to the actions of the district court. First, the district court did not have the authority to release petitioner on bail pending district court determination of his habeas corpus application. This issue is moot. Secondly, the district court allegedly did not allow the State reasonable time to retry petitioner in light of his subsequent disappearance. The State's attorney stated during oral argument of this case that petitioner had been located since this claim was made. It would appear, therefore, that the State should have no trouble in retrying petitioner, if it so desires, within the four months allowed by the district court.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1311

JACK HENRY SMITH,

Petitioner-Appellee,

VERSUS

S. LAMONT SMITH, Warden,
Georgia State Prison,

Respondent-Appellant.

Appeal from the United States District Court
For the Northern District of Georgia

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Dec. 14, 1971, 5 Cir., 1971, ____ F.2d ____).

(February 1, 1972)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM: In our original opinion we stated, "On March 12, 1969, petitioner was convicted by a jury of two counts of burglary." Appellant directs the court's

attention to the fact that two defendants were involved in the district court habeas corpus proceeding; and petitioner here, unlike his co-petitioner, was convicted by a jury on a charge of robbery on May 9, 1968.

Appellant in his petition for rehearing argues that this change in the date of trial renders erroneous our refusal to consider the retroactive effect of the district court's judgment. We believe, however, that whatever the outcome might be on the issue of retroactive application of the rule announced in the instant case, petitioner here must be given the benefit of our decision. As held by the Supreme Court in *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967 (1967):

> That [he] must be given that benefit is . . . an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying . . . the benefit of today's decision.

388 U.S. at 301, 87 S.Ct. at 1972.

We therefore, realizing the gravity of the issue involved, continue to refuse to consider, in the absence of necessity, the retroactive effect of our decision prior to the Eight Circuit decisions of 1969 and the Supreme Court's resulting action. *See Smith v. Smith,* 5th Cir. 1971, ____ F.2d ____, n.4.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled

on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is DENIED.

APPENDIX C

ORDER.

Filed Dec. 28, 1970.

United States District Court,
Northern District of Georgia,
Atlanta Division.

Jack Henry Smith,

vs.

S. Lamont Smith, Warden.

Civil Action No. 14304.

Tracy Shoemake,

vs.

J. W. Whitlock, Warden, Coweta County Work Camp.

Civil Action No. 14305.

Petitioners are state prisoners who have been allowed to file in forma pauperis their respective petitions for the writ of habeas corpus.

Petitioner Shoemake was convicted on two counts of burglary in the Superior Court of Coweta County, Georgia, on March 12, 1969, and is presently serving concurrent sentences of five years on each count in the Coweta County Prison Work Camp. Petitioner sought habeas corpus relief in the Superior Court of Coweta County. Relief was denied and petitioner appealed to the Georgia Supreme Court which affirmed the lower Court in *Shoemake v. Whitlock*, . . . Ga. . . . (No. 26038, Oct. 1, 1970), on the ground that the issue was not one properly raised by habeas corpus. Exhaustion of state remedies is therefore sufficient under 28 U.S.C. § 2254.

Petitioner Smith was convicted for the offense of robbery in the Superior Court of Fulton County, Georgia, on May 9, 1968, and was sentenced to a ten-year term of imprisonment. Exhaustion of state remedies is alleged and is sufficient under 28 U.S.C. § 2254, in that petitioner sought habeas corpus relief in the Superior Court of Tattnall County. Relief was granted, but on appeal the Supreme Court of Georgia reversed the lower Court's decision in *Smith v. Smith,* . . . Ga. . . . (No. 26001, Oct. 8, 1970), following the decision in *Shoemake v. Whitlock, supra.*

The cases were consolidated and set for hearing on November 23, 1970.[1]

Petitioners attack their respective convictions solely on the ground that the trial Court's charge to the jury, regarding the defense of alibi, was in violation of the Due Process Clause of the Fourteen Amendment to the United States Constitution. Specifically, petitioners contend (1) that the charge placed upon each of them the burden of proving his defense of alibi, thereby shifting the burden of proof to him; (2) that the charge deprived him of the presumption of innocence and relieved the State of the burden of proving each element of the crime charged beyond a reasonable doubt; and (3) that the charge was inconsistent and confusing to the jury.

In Smith's case the trial Court gave the following charge on the alibi defense:

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[1]Neither Respondent Whitlock nor his attorney attended the hearing. Subsequent to his response and an order of this Court dated November 6, 1970, setting the case down for hearing, respondent informed the Court that he had nothing further to present and that he desired the case to be considered solely upon the briefs submitted. In addition to his brief respondent's position was adequately stated at the hearing by counsel representing Respondent Smith.

"He contends and sets up in his defense under the law what is known as an alibi, and I charge you alibi as a defense involves the impossibility of the accused's presence at the scene of the offense at the time of its commission, and the range of the evidence in respect to time and place must be such as reasonably to exclude the possibility of presence. Alibi as a defense must be established to the reasonable satisfaction of the jury, and must be such as reasonably to exclude the possibility of the presence of the defendant at the scene of the offense at the time of its commission. When so established to the reasonable satisfaction of the jury, the jury should acquit. Any evidence in the nature of an alibi should be considered by the jury in connection with all other evidence in the case, and if in doing so the jury should entertain a reasonable doubt as to the guilt of the accused, they should acquit.

"The law of alibi consists of two branches. The first is to overcome proof of guilt strong enough to exclude all reasonable doubt, the onus is on the accused to verify his alleged alibi, not beyond reasonable doubt, but to the reasonable satisfaction of the jury. The second is that, nevertheless, any evidence whatever of alibi is to be considered on the general case with the rest of the testimony, and if a reasonable doubt of guilt be raised by the evidence as a whole, the doubt must be given in favor of innocence."[2]

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[2]The second paragraph of the charge was requested by Petitioner Smith. This fact is emphasized in Respondent Smith's motion to dismiss. The Court considers the requested charge merely as an attempt by defendant's trial counsel to bring out the most favorable aspects of Georgia alibi law. The Court will not permit petitioner to be prejudiced by the requested charge. The remaining contentions of the motion to dismiss are without merit.

The charge given in Shoemake's case is substantially similar.[3]

Jury charges on the defense of alibi have had a long and stormy history in Georgia case law. Alibi as a defense is established by statute.[4] As is true in the cases presently under consideration, Georgia trial Courts have traditionally included the language of the statute in jury charges when alibi is present in the case. The major controversy in the case law, however, relates to the phrase, "Alibi as a defense must be established to the reasonable satisfaction of the jury," which also has long been included in jury charges. The cry often heard, and the cry heard here, is that the above-quoted phrase places the burden of proving his alibi on the defendant.[5]

Charges comparable to those presently before the Court have often been criticized by both scholars and the Georgia Courts. Much of the criticism has centered around the confusing nature of the alibi charge and the fact that Georgia law treats alibi as an affirmative defense.

Professor Green has stated:

"The proposition that the burden of proof is on the defendant to establish alibi and certain other defenses in a

[3]The only substantial difference between the charges is that in Shoemake's case the second paragraph of the charge quoted above was not given.

[4]Ga. Code Ann. § 38-122 provides: "Alibi, as a defense, involves the impossibility of the accused's presence at the scene of the offense at the time of its commission; and the range of the evidence, in respect to time and place, must be such as reasonably to exclude the possibility of presence."

[5]But *see, Smith v. State,* 3 Ga. App. 803, 61 S.E. 737 (1907) where defendant alleged as error trial Court's failure to charge that defendant should be acquitted if he establishes his alibi to the reasonable satisfaction of the jury.

criminal case to the reasonable satisfaction of the jury, but that the evidence of the defense is to be considered by the jury in determining whether the State has established guilt of the defendant beyond a reasonable doubt, is contradictory. . . . If an accused may legally be acquitted because evidence of alibi, insanity, or justification raises a reasonable doubt in the mind of the jury, the burden remains on the prosecution to prove the defendant's complicity, mental capacity, and malice. Then why not be satisfied with telling the jury that the burden of establishing guilt beyond a reasonable doubt is on the State? Why not leave out the confusing, contradictory, indeed, meaningless charge that the accused has the burden of proving alibi, etc.?" Green, Georgia Law of Evidence, § 21, at 75-77.

Professor Agnor has made the following criticism:

"The Georgia Courts have treated several defenses as affirmative defenses that are not true affirmative defenses. One is the matter of alibi as a defense. Alibi is not a true affirmative defense. It is simply evidence rebutting the case for the prosecution. It is a denial of the charge against the defendant. . . . The jury is charged that the defendant must establish alibi by a preponderance of the evidence, but then must also be charged that the evidence as to alibi must be considered with all the other evidence in the case and that if they then have a reasonable doubt as to his guilt they must acquit. In other words, first he must prove by a preponderance of the evidence that he was not present at the scene of the offense at the time of its commission, but no, really all he must do is raise a reasonable doubt as to his presence. First it is an affirmative defense, then it is not an affirmative defense." 11 Encyclopedia of Georgia Law (Evidence), § 138 at 379.

Judge Powell, in *Smith v. State*, 3 Ga. App. 803, 61 S.E. 737 (1907), stated:

"In such cases [where affirmative defense is asserted] it is logically consistent to charge that the burden of establishing the case in chief beyond a reasonable doubt rests upon the State, but that the defendant may avoid responsibility and thereby obtain an acquittal if he establishes his defense to the reasonable satisfaction of the jury. Alibi is no such defense, and it is confusing and incongruous so to classify it. In truth the burden of proving an alibi is never on the defendant; the burden of proving his presence is on the State throughout the trial, and the evidence of his absence tends merely to weaken or disprove the testimony of the State's witnesses on this point." At 806.

Though criticized, the Georgia charge on alibi has consistently been upheld, primarily on the authority of *Harrison v. State*, 83 Ga. 129, 9 S.E. 542 (1889). There the Georgia Supreme Court stated:

"Touching alibi, the rule in Georgia as established by authority consists of two branches. The first is, that to overcome proof of guilt strong enough to exclude all reasonable doubt, the onus is on the accused to verify his alleged alibi, not beyond reasonable doubt, but to the reasonable satisfaction of the jury. The second is that, nevertheless, any evidence whatever of alibi is to be considered on the general case with the rest of the testimony, and if a reasonable doubt of guilt be raised by the evidence as a whole, the doubt must be given in favor of innocence." At 130.

Even in announcing this rule Chief Justice Bleckley

did not pass up the opportunity to criticize Georgia's law regarding alibi.[6]

It is under the second principle of the two-pronged approach of Harrison that the Georgia Courts have upheld the alibi charge. *E.g., Chaffin v. State,* 225 Ga. 602, 170 S.E.2d 426 (1969); *Young v. State,* 225 Ga. 255, 167 S.E.2d 586 (1969); *Laminack v. State,* 187 Ga. 648, 1 S.E.2d 667 (1939); *Jones v. State,* 130 Ga. 274, 60 S.E. 840 (1908); *Cochran v. State,* 113 Ga. 726, 39 S.E. 332 (1901); *Bone v. State,* 102 Ga. 387, 30 S.E. 845 (1897); *Hale v. State,* 110 Ga. App. 236, 138 S.E.2d 113 (1964); *Copeland v. State,* 33 Ga. App. 150, 125 S.E. 781 (1924). To fail to charge the jury as to the second prong of the alibi defense has been held to be error. *Moody v. State,* 17 Ga. App. 121, 86 S.E. 285 (1915); *Callahan v. State,* 14 Ga. App. 442, 81 S.E. 380 (1914). Use of the two-pronged alibi charge has expressly been held not to be confusing. *Davis v. State,* 205 Ga. 719, 55 S.E.2d 214 (1949). Thus it appears that Georgia law permits a charge which requires defendant to prove by some quantum of evidence his defense of alibi, if the charge also instructs the jury to consider evi-

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[6]In Harrison, supra, the Chief Justice stated: "Were our own minds not hedged in by authority, we should be inclined to adopt the view expressed by Judge Thompson (2 Thomp. on Trials, § 2436), who, after recognizing that the burden of proof is upon the accused, adds: 'But upon the most unshaken grounds this burden is sustained, and an adequate quantum of proof produced by the defendant, when he succeeds in raising a reasonable doubt in the minds of the jurors as to whether or not he was at the place of the crime when it was committed.' . . . It seems to us that in the metaphysics of trial, there is great difficulty in distinguishing between reasonable doubt on the specific defense of alibi, and reasonable doubt of guilt upon the whole case taken together. Where presence is necessary to constitute guilt, it seems that a reasonable doubt of presence would, by irresistible logic, involve reasonable doubt of guilt." At 135.

dence of alibi with evidence of the general case and directs the jury to acquit if the evidence as a whole raises a reasonable doubt in their mind as to the defendant's guilt.

Exactly what quantum of proof is required of the defendant is not clear. It is clear that the defendant is not required to prove his alibi beyond a reasonable doubt; *Hale v. State*, 110 Ga. App. 236, 138 S.E.2d 113 (1964); *Evans v. State*, 13 Ga. App. 700, 79 S.E. 916 (1913); but there has been some question in the past as to whether defendant must prove his alibi by a preponderance of the evidence. Several Georgia cases seemed to have placed such a burden on the defendant. *Laminack v. State*, 187 Ga. 648, 1 S.E.2d 667 (1939); *Jones v. State*, 130 Ga. 274, 60 S.E. 840 (1908); *Cochran v. State*, 113 Ga. 726, 39 S.E. 332 (1901); *Bone v. State*, 102 Ga. 387, 30 S.E. 845 (1897); *Copeland v. State*, 33 Ga. App. 150, 125 S.E. 781 (1924). Some cases have specifically held the placing upon a defendant the burden of proving his alibi by a preponderance of the evidence to be error. *Pritchard v. State*, . . . Ga.App. . . ., No. 45542 (Ga. Ct.App., Nov. 9, 1970); *Moultrie v. State*, 93 Ga. App. 396, 92 S.E.2d 33 (1956). The most widely used wording of defendant's burden is that "alibi must be established to the reasonable satisfaction of the jury," and this standard has been widely approved throughout the Georgia cases. *Porter v. State*, 200 Ga. 246, 36 S.E.2d 794 (1946); *Eugee v. State*, 159 Ga. 604, 126 S.E. 471 (1925); *Harrison v. State*, 83 Ga. 129, 9 S.E. 542 (1889); *Johnson v. State*, 59 Ga. 142 (1877); *Lewis v. State*, 11 Ga. App. 102, 74 S.E. 708 (1912). Several cases seem to indicate that reasonable satisfaction of the jury and preponderance of the evidence are

the same. *Bone v. State,* 102 Ga. 387, 30 S.E. 845 (1897); *Hale v. State,* 110 Ga. App. 236, 138 S.E.2d 113 (1964). More recent authority indicates that the two standards might not be the same. *Pritchard v. State,* . . . Ga. App. . . ., No. 45542 (Ga.Ct. App., Nov. 9, 1970).

Decisions from the Eighth Circuit have had a noticeable impact on the Georgia alibi charge. In *Stump v. Bennett,* 398 F.2d 111 (8th Cir. 1968), the Eighth Circuit held the Iowa charge on alibi unconstitutional which required a defendant to prove his alibi by a preponderance of the evidence. Prior to *Stump,* the Eighth Circuit had upheld the Iowa alibi charge. *Johnson v. Bennett,* 386 F.2d 677 (8th Cir. 1967). The United States Supreme Court granted certiorari and subsequently remanded the case for reconsideration in light of the intervening *Stump* decision. *Johnson v. Bennett,* 393 U.S. 253 (1968). On remand, the *Stump* decision was followed. *Johnson v. Bennett,* 414 F.2d 50 (8th Cir. 1969).

In light of these developments from the Eighth Circuit, Judge Hall of the Georgia Court of Appeals held the Georgia charge on alibi to be unconstitutional in *Parham v. State,* 120 Ga.App. 723, 171 S.E.2d 911 (1969), and stated:

". . . [A] charge to the jury that alibi must be established by the defendant to the reasonable satisfaction of the jury is error for the reason that it shatters the presumption of innocence, creates confusion in the minds of the jury, shifts the burden of persuasion to the defendant on the issue of his presence, at the crime and requires him to establish his innocence, is inconsistent with the principle that the State must prove the defendant's guilt beyond a reasonable doubt, and thereby

violates fundamental rights incorporated in the due process clause of the Fourteenth Amendment of the United States Constitution." *Parham, supra,* at 723-24.

A United States District Court in this district has had occasion to consider comparable Georgia charges regarding the alibi defense.[7] In *Hudson v. Stynchcombe,* Civil Action No. 13132 (N.D.Ga., Dec. 17, 1969), and *Chaffin v. Stynchcombe,* Civil Action No. 13340 (N.D.Ga., Dec. 17, 1969), the charges given to the jury were held to be in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Subsequent to these decisions, however, the Georgia Supreme Court has persisted to uphold similar charges;[8] *Thornton v. State,* . . . Ga. . . ., S.E.2d . . ., Case No. 25808 (Ga.Sup.Ct., Nov. 5, 1970); *Williams v. State,* 226 Ga. 140, . . . S.E.2d . . . (1970); and have refused to consider the constitutionality of the alibi charge on petition for habeas corpus. *Shoemake*

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[7]The charges considered in Hudson, infra, and Chaffin, infra, are as follows: "Alibi as a defense involves the impossibility of the accused's presence at the scene of the offense at the time of its commission and the range of the evidence in respect to time and place must be such as reasonably to exclude the possibility of presence of the defendant at the scene of the offense at the time of its commission. When so established to the reasonable satisfaction of the jury, the jury should acquit. Any evidence in the nature of an alibi should be considered by the jury in connection with all other evidence in the case and if in doing so, the jury should entertain a reasonable doubt as to the guilt of the accused, they should acquit."

[8]Justice Felton, concurring specially in part and dissenting in part in Thornton, supra, has provided an exception to the Court's view. He stated: "As to the Georgia cases I think all of them rendered by this Court holding that the placing of any affirmative burden of proof as to alibi on a defendant were not contrary to the due process clauses of both the State of Georgia and the United States are wrong and should be overruled."

v. Whitlock, supra. The Georgia Supreme Court though recognizing the Eighth Circuit decisions and the decision in *Johnson v. Bennett,* 393 U.S. 253 (1968), have held the Georgia alibi charge to be distinguishable on its face. The Georgia Supreme Court apparently believes there is a sufficient distinction between "preponderance of evidence" and "reasonable satisfaction of the jury," to authorize the upholding of the Georgia charge in the face of the Eighth Circuit decisions and the decisions of this Court.

With the history of the Georgia case law behind us, we must now proceed to make the three necessary determinations of the case. First, can this Court entertain on petition for habeas corpus a constitutional challenge to a state Court's jury instructions? Second, are the concepts of the State's burden of proof in criminal cases and the accused's presumption of innocence an integral part of due process rights? Third, have petitioners been denied due process by the jury charge given in the state Court?

It is not difficult to determine that this Court is authorized to review the jury instruction when Constitutional questions are presented. The Fifth Circuit Court of Appeals has stated:

"Habeas corpus does not lie to set aside a conviction on the basis of improper jury instructions unless the impropriety is a clear denial of due process so as to render the trial fundamentally unfair." *Higgins v. Wainwright,* 424 F.2d 117, 178 (5th Cir. 1970). Accord, *McDonald v. Sheriff of Palm Beach, Florida,* 422 F.2d 839 (5th Cir. 1970); *Murphy v. Beto,* 416 F.2d 98 (5th Cir. 1969); *Gomez v. Beto,* 402 F.2d 766 (5th Cir. 1968).

The principle that the State has the burden of proof

in all criminal cases and that the accused is clothed with the presumption of innocence have long been regarded as an integral part of the concept of due process. In regard to the presumption of innocence, the Supreme Court stated in *Coffin v. United States,* 156 U.S. 432 (1895), that:

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." 156 U.S. at 453.

As to the burden of proof, the Supreme Court stated in *Speiser v. Randall,* 357 U.S. 513 (1958):

"There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt." 357 U.S. at 525-26. See also *Cummings v. Missouri,* 4 Wall. 277, 328 (1866); *Morrison v. California,* 291 U.S. 82, 93 (1934); *Deutch v. United States,* 367 U.S. 456, 471 (1961).

When the burden of proof (i.e., persuasion) is shifted to the defendant to disprove essential elements of a crime, then it is certain that the due process clause of the

Fourteenth Amendment has been violated. *Stump v. Bennet, supra,* citing *Deutch v. United States,* 367 U.S. 456, 471 (1961); *Speiser v. Randall,* 357 U.S. 513, 525 (1958); *Morissette v. United States,* 342 U.S. 246, 275 (1952); *Morrison v. California,* 291 U.S. 82, 93 (1934); *Manley v. Georgia,* 279 U.S. 1, 6 (1929); *McFarland v. American Sugar Refining Co.,* 241 U.S. 79, 86 (1916).

Turning now to the merits of petitioner's claim, the Court notes that a substantial portion of the confusion in the case law may be attributed to the confusion surrounding the term "burden of proof." There may be said to be two aspects to this burden. First, there is the burden of persuasion or, as it is traditionally called, the burden of proof. Second, there is the burden of going forward with the evidence, or as it is traditionally termed, the burden of the evidence. Clearly the burden of proof, as opposed to the burden of the evidence, is properly on the State in criminal cases. See Green, Georgia Law of Evidence, §§ 17, 18, 21, 22; Wigmore, Evidence (3d ed.), §§ 2485, 2487, 2489.

At the outset of a criminal trial, the State has both burdens upon it. If during the presentation of its case the State presents sufficient evidence to rebut the accused's presumption of innocence beyond a reasonable doubt, then the burden of going forward with the evidence shifts to the accused, otherwise, he would stand convicted. The accused is under no duty to present evidence or to establish it by any quantum of proof. He is merely in the interest of justice given an opportunity to rebut the State's evidence. If the accused fails to rebut the State's evidence, he will be convicted. If his rebuttal is successful, he will be acquitted. At no time during a

criminal trial does the burden of proof shift to the accused.

Notwithstanding this confusion, under Georgia law the burden of proof (i.e., burden of persuasion) is cast upon the accused to prove his alibi by some quantum of proof. Regardless of what quantum of proof is required, this practice is unconstitutionally impermissible in cases involving the alibi defense. We note that the charge states, "Alibi as a defense, must be established to the reasonable satisfaction of the jury," and leads us to the unavoidable conclusion that the burden is on the accused. The Georgia appellate Courts have consistently upheld the charge on the ground that the jury is also charged to consider evidence of alibi along with all evidence in the case and if the evidence as a whole raises a reasonable doubt as to defendant's guilt, he should be acquitted. It is an understatement to conclude that such instruction is confusing and inconsistent.

This, however, is insufficient in and of itself to enable this Court to grant relief. When considered in light of the fact that the instruction places the burden of proof on the defendant, this Court is compelled to remove the contested portion of the charge as in violation of due process. To reach a contrary conclusion would in effect require the defendant to prove his "non-presence" at the scene of the offense at the time of its commission. Being an essential element of the crime, the State must prove beyond a reasonable doubt defendant's presence at the commission of the offense. It is impermissible to require the defendant to prove his non-presence by any definite quantum of proof. Assuming that the State presents evidence of defendant's presence, the burden of going forward with evidence to contradict the State's evidence may shift to

the defendant but it must not carry with it the requirement that defendant establish his evidence by any quantum of proof (i.e., a burden of proof or persuasion). Evidence of alibi should come into the case like any other evidence for the jury's consideration as to whether guilt has been established beyond a reasonable doubt.

Long ago the Fifth Circuit properly stated the posture of the alibi defense. In *Falgout v. United States,* 279 F. 513 (5th Cir. 1922), the Court stated:

"By adducing that evidence [of alibi] the defendants did not assume any burden of proof. After, as well as before, that evidence was adduced, the burden was on the prosecution to prove that when the crime was committed the defendants were at a place at which they could take part in the commission of it and that they did participate in committing it.

"Evidence tending to prove an alibi was in rebuttal of evidence offered by the prosecution tending to sustain the charges contained in the indictment. Such evidence is effective in behalf of a defendant in a criminal case, if it, when considered in connection with the other evidence adduced, gives rise to a reasonable doubt of his guilt of the offense charged, though there is no finding that an alibi was shown by a preponderance of evidence. The burden of proof did not shift, and it was not upon the defendants to establish alibis by a preponderance of evidence."[9] At 515.

[9]In Falgout, supra, the trial Court had refused to give the following instruction: "Where the defense is an alibi, then the evidence in support of it should be considered in connection with all the other evidence in the case, and if, on the whole evidence, there is reasonable doubt of the guilt of an accused, he should be acquitted. The burden of proof is not upon an accused to establish an alibi by a preponderance of evidence." At 515.

We find it immaterial whether the burden is termed "preponderance of the evidence" or "reasonable satisfaction of the jury." Defendant has no burden to prove his alibi. Evidence of alibi should come into the case like any other evidence, and should be submitted to the jury for consideration of whether the evidence as a whole proves defendant's guilt beyond a reasonable doubt. Thus, we find the Georgia charge on alibi, insofar as it places the burden of proving his alibi on the accused, to be unconstitutional as in violation of due process.

It is, therefore, Ordered and Adjudged that the writ of habeas corpus be Granted and petitioners be Remanded to their respective state Courts of conviction for new trial. The State is Directed to retry petitioners within four months after the final determination of this case. If the State does not appeal, it is Directed that petitioners be retried prior to April 1, 1971. In the event the State fails to retry petitioner as directed the case shall stand dismissed.

This 23rd day of December, 1970.

NEWELL EDENFIELD
(Newell Edenfield),
United States District Judge

NOTICE OF APPEAL.

Filed Jan. 19, 1971.

United States District Court,
Northern District of Georgia,
Atlanta Division.

Jack Henry Smith, Petitioner-Appellee,

vs.

S. Lamont Smith, Warden, Respondent-Appellant.

Civil Action No. 14304.

Notice is hereby given that, S. Lamont Smith, the respondent above-named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order and final judgment entered in this action on the 28th day of December, 1970.

APPENDIX D

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-1311

D. C. Docket No. CA 14304

JACK HENRY SMITH,

Petitioner-Appellee,

VERSUS

S. LAMONT SMITH, WARDEN,
GEORGIA STATE PRISON,

Respondent-Appellant.

Appeal from the United States District Court
For the Northern District of Georgia

Before THORNBERRY, MORGAN and CLARK,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel for appellant; and was taken under submission by the Court upon the record and briefs on file for appellee.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

December 14, 1971

Issued As Mandate:

APPENDIX E

Charge of the Court.

Gentlemen of the jury, the Grand Jury of this County returned a true bill of indictment in which they charge Dale James Rabideaux and Jack Henry Smith with the offense of robbery, alleging that the said accused in the County of Fulton, State of Georgia, on the 26th of December, 1967, did wrongfully, fraudulently and violently by open force and violence, by offering and threatening to shoot one Harold Martin with a pistol, which accused exhibited, the same being an offensive weapon and one likely to produce death when used in its usual and customary manner and by offering and threatening to shoot the said Martin with an article, replica and device having the appearance of a pistol, an offensive weapon, which accused exhibited and by intimidation take from the person of the said Harold Martin, without his consent and with intent to steal the same $447.00 in money, or the value of $447.00 and the property of the Great Atlantic and Pacific Tea Company, contrary to the laws of said State, good order, peace and dignity thereof.

The defendant on trial, Jack Henry Smith, is the only defendant on trial at this time and you will not be concerned with the guilt or innocence of the other defendant named in the bill of indictment.

Upon arraignment the defendant, Jack Henry Smith, enters his plea of not guilty to the charge as made in the indictment and that makes the issue you are to pass upon in this case. The indictment is not evidence and shall not be considered by you as evidence. The only purpose it serves is to bring the charge against the defendant, Jack Henry Smith, into Court and that defendant enters upon

the trial of his case with a legal presumption of innocence in his favor and that presumption goes with him throughout the trial and until the State removes it by evidence sufficient to convince your minds beyond a reasonable doubt of the defendant, Jack Henry Smith's guilt.

The burden is, therefore, upon the State to prove all of the material allegations contained in the bill of indictment beyond a reasonable doubt before you would be authorized to convict the defendant on trial.

Our law declares that robbery is the wrongful, fraudulent and violently taking of money, goods or chattels from the person of another by force, use of an offensive weapon, by intimidation or by sudden snatching without the consent of the owner or person in possession or control thereof, with intent to steal the same. The use of or offer to use an offensive weapon or a weapon likely to produce death when used in its usual and customary manner or any replica, article or device having the appearance of such weapon in the taking of personal property from another shall constitute robbery by use of an offensive weapon. Robbery by use of an offensive weapon shall be punished by death unless the jury recommends mercy in which event the punishment shall be imprisonment for life, provided, however, the jury in all cases may fix the punishment by imprisonment and labor in the penitentiary for not less than four years nor more than twenty years.

In this case the State contends there was a conspiracy between the defendant on trial, Jack Henry Smith, and the other defendant, Dale James Rabideaux, or others, and I charge you a conspiracy consists in a corrupt agreement between two or more persons to do an unlawful act. This agreement may be established by direct proof or by

inference as a deduction from conduct which discloses a common design on the part of the persons charged to act together for the accomplishment of the unlawful purpose. If two or more persons should form an intent and purpose to commit a crime and if in pursuance of such intent and purpose a crime should be committed as contemplated, the acts of each person done in the commission of the crime would be attributable to and as the acts of all present aiding and abetting in the commission of the crime. It is a question for the jury to determine whether or not a conspiracy has been shown. If no conspiracy or concert of action be shown each person would be responsible only for his own acts.

The defendant has made to you a statement which he has the right to do, the law being in all criminal cases the defendant shall have the right to make to the Court and jury such statement in his defense as he may see fit and proper. That statement shall not be under oath and the jury trying the case shall give such weight and credit to it as they think it entitled to receive. You may believe the statement of the defendant in preference to the sworn testimony in the case. He contends he is not guilty of the charge laid against him in the bill of indictment. The State contends he is. That is the question for you to pass upon in the case.

He contends and sets up in his defense under the law what is known as an alibi and I charge you alibi as a defense involves the impossibility of the accused's presence at the scene of the offense at the first time of its commission and the range of the evidence in respect to time and place must be such as reasonably to exclude the possibility of presence. Alibi as a defense must be established to the reasonable satisfaction of the jury and must be

such as reasonably to exclude the possibility of the presence of the defendant at the scene of the offense at the time of its commission. When so established to the reasonable satisfaction of the jury, the jury should acquit. Any evidence in the nature of an alibi should be considered by the jury in connection with all other evidence in the case and if in doing so the jury should entertain a reasonable doubt as to the guilt of the accused they should acquit.

The law of alibi consists of two branches. The first is to overcome proof of guilt strong enough to exclude all reasonable doubt, the onus is on the accused to verify his alleged alibi, not beyond reasonable doubt, but to the reasonable satisfaction of the jury. The second is that, nevertheless, any evidence whatever of alibi is to be considered on the general case with the rest of the testimony, and if a reasonable doubt of guilt be raised by the evidence as a whole, the doubt must be given in favor of innocence.

I charge you where the facts in evidence and all reasonable deductions therefrom present two theories, one of guilt and the other consistent with innocence, the justice and humanity of the law compel the acceptance of the theory which is consistent with innocence.

If you convict the defendant it will become your duty to fix the punishment and the punishment for robbery by use of an offensive weapon is death by electrocution. The State does not insist upon the extreme penalty and, therefore, you will not be concerned with that.

If you convict the defendant you have the right to recommend mercy in which event the defendant would be sentenced to the penitentiary for and during his natural life. If you convict the defendant the form of your verdict

would be: we, the jury, find the defendant guilty and recommend mercy. A verdict reading that way would mean that the defendant, Jack Henry Smith, would be sentenced to the penitentiary for and during his natural life.

You have the further right if you convict the defendant, to recommend a sentence of a term of years, any number of years between four and twenty inclusive. If you convict the defendant and see fit to recommend a term of years the form of your verdict would be: we, the jury, find the defendant, Jack Henry Smith, guilty and recommend mercy. We further recommend so many years, a number between four and twenty inclusive.

You have the further right to recommend him to misdemeanor punishment in which event you would add to the form of your verdict which I have just given you: and we recommend misdemeanor punishment. Your verdict then reading: we, the jury, find the defendant, Jack Henry Smith, guilty and recommend mercy. We further recommend so many years and we further recommend misdemeanor punishment. A verdict reading that way the Court could in his discretion impose misdemeanor punishment which is a term of twelve months in the public works camp, a fine of $1,000.00, either one or both in the discretion of the Court.

Before you would be authorized to convict the defendant on trial, Jack Henry Smith, his guilt should be made plainly and manifestly to appear beyond a reasonable doubt and a reasonable doubt is a doubt that you can give a reason for. If you have a reasonable doubt as to the defendant, Jack Henry Smith's guilt then that doubt must be resolved in favor of the defendant and it would be your duty to acquit him.

If you acquit the defendant the form of your verdict would be: we, the jury, find the defendant, Jack Henry Smith, not guilty.

Whatever verdict you render be sure the name Jack Henry Smith is incorporated therein.

Counsel have agreed you may write your verdict on a photostatic copy of the indictment which you will have out with you. You will write the verdict and date it on the back and have it signed by your foreman and returned into Court. You may retire.

(Whereupon the jury retired to the jury room at 3:45 P.M.)

By the Court:

Any objections or exceptions to the charge?

By Mr. Holmes:

No objections from the defense, Your Honor.

By Mr. Goode:

Nothing from the State.

(Whereupon at 9:25 P.M. the jury returned to the jury box, requesting further instructions from the Court.)

By the Court:

Mr. Foreman, is there some question?

By the Foreman:

Yes, sir. We would like for you to again tell us exactly how to word the verdict.

By the Court:

The penalty for robbery by use of an offensive weapon

is death by electrocution. The State does not insist upon the extreme penalty of the law and you will, therefore, not be concerned with that. If you convict the defendant on trial, Jack Henry Smith, the form of your verdict would be: we, the jury, find the defendant, Jack Henry Smith, guilty and recommend mercy. A verdict reading that way would mean that Jack Henry Smith would be sentenced to the penitentiary for and during his natural life.

If you convict the defendant on trial you have the right, the further right to fix a term of years in the penitentiary at any number between four and twenty inclusive and if you convict him and see fit to recommend a term of years in the form of your verdict would be: we, the jury, find the defendant, Jack Henry Smith, guilty and recommend mercy. We further recommend so many years, any number between four and twenty inclusive.

You have the further right to recommend misdemeanor punishment in which event you would add to the form of the last verdict which I have just given you: and we recommend misdemeanor punishment. The verdict then reading: we, the jury, find the defendant, Jack Henry Smith, guilty of robbery by use of an offensive weapon and recommend mercy. We further recommend so many years, whatever number you fix between four and twenty inclusive and we further recommend misdemeanor punishment. A verdict reading that way the Court could in his discretion impose misdemeanor punishment which is a term in the public works camp not to exceed twelve months, a fine not to exceed $1,000.00, either one or both in the discretion of the Court.

Before you would be authorized to convict the defendant on trial, Jack Henry Smith, his guilt should be made

plainly and manifestly to appear beyond a reasonable doubt and a reasonable doubt is a doubt that you can give a reason for. If you have a reasonable doubt as to the defendant's guilt that doubt must be resolved in favor of the defendant and it would be your duty to acquit him.

If you acquit the defendant the form of your verdict would be: we, the jury, find the defendant, Jack Henry Smith, not guilty.

Whatever verdict you render be sure the name Jack Henry Smith is incorporated therein. Let your verdict be dated and signed by your foreman and returned into Court. Is that clear?

By the Foreman:

Yes, sir.

APPENDIX F

PENDING CASES INVOLVING THE CHARGE ON ALIBI GIVEN TO JURIES IN GEORGIA CRIMINAL TRIALS

DIRECT APPEALS

1. Supreme Court of the United States: *Johnny B. Williams v. State of Georgia,* No. 70-5413, petition for certiorari to review decision of the Supreme Court of Georgia (226 Ga. 140 [1970]) filed June 19, 1970.

2. Supreme Court of Georgia: *Robert D. Johnson v. State,* No. 27068, appeal from the Superior Court of Fulton County, assigned for oral argument March 15, 1972.

3. Supreme Court of Georgia: *Michael Sawyer v. State,* No. 27069, appeal from the Superior Court of Fulton County, assigned for oral argument March 15, 1972.

4. Georgia Court of Appeals: Listing of cases involving alibi instructions not available.

COLLATERAL REVIEW

5. Supreme Court of the United States: *Poss v. Smith, Warden,* No. 71-5639, petition for certiorari to review the decision of the Supreme Court of Georgia denied February 22, 1972.

6. United States Court of Appeals, Fifth Circuit: *Gary Thornton v. E. B. Caldwell, Warden,* No. 71-1603, appeal from the Northern District of Georgia, Atlanta Division, rehearing denied, February 2, 1972, mandate stayed pending application for writ of certiorari to the Supreme Court of the United States.

7. United States Court of Appeals, Fifth Circuit: *S. Lamont Smith, Warden v. Jack Henry Smith,* No. 71-1311, rehearing denied February 1, 1972, mandate stayed pending application for certiorari to the Supreme Court of the United States.

8. United States Court of Appeals, Fifth Circuit: *Jerry Dale Mathis v. E. B. Caldwell, Warden,* Civil Action No. 772, appeal from Middle District of Georgia, Macon Division, reversed February 1, 1972, mandate stayed pending application for writ of certiorari to the Supreme Court of the United States.

9. United States Court of Appeals, Fifth Circuit: *William R. Hiatt v. Doyle Smith, Warden,* No. 71-2512, appeal from the Middle District of Georgia, Macon Division, reversed February 2, 1972, mandate stayed pending application for writ of certiorari to the Supreme Court of the United States.

10. United States Court of Appeals, Fifth Circuit: *James K. Bassett v. S. Lamont Smith, Warden,* No. 71-2513, appeal from Middle District of Georgia, Macon Division, pending.

11. United States District Court, Northern District of Georgia, Atlanta Division: *Gerald McMaster Baker v. E. B. Caldwell, Warden,* Civil Action No. 15028, application for collateral review of a life sentence imposed upon conviction of murder, April 23, 1969, Superior Court of DeKalb County, stayed pending decision in cases under appeal August 13, 1971.

12. United States District Court, Northern District of Georgia, Atlanta Division: *Rudolph O. Hightower v. E. B. Caldwell, Warden,* Civil Action No. 15322, application for collateral review of life sentence imposed

upon conviction for murder January 17, 1969, Superior Court of Fulton County, stayed pending decision in cases under appeal, September 22, 1971. (Previous appearance in Supreme Court of United States, No. 70-6656, cert. denied June 7, 1971.)

13. United States District Court, Northern District of Georgia, Atlanta Division; *James Clyde Hart v. S. Lamont Smith, Warden,* Civil Action No. 14922, application for collateral review of sentences totalling effectively seven years imposed upon three convictions for larceny and one conviction for possession of burglary tools, April 3, 1969, Superior Court of Hall County, stayed pending decision on appealed cases August 6, 1971.

14. United States District Court, Northern District of Georgia, Atlanta Division: *John Virgil Cash v. S. Lamont Smith, Warden,* Civil Action No. 14919, stayed pending decision on appealed cases June 4, 1971.

15. United States District Court, Northern District of Georgia, Atlanta Division: *Milford Lee v. S. Lamont Smith, Warden,* Civil Action No. 14964, stayed pending decision on appealed cases. Lee presently on parole.

16. United States District Court, Northern District of Georgia, Atlanta Division: *Ralph Kenneth Montgomery v. E. B. Caldwell, Jr., Warden,* Civil Action No. 15401, pending.

17. United States District Court, Southern District of Georgia, Savannah Division: *George Trull v. S. Lamont Smith, Warden,* Civil Action No. 2810, pending.

18. Superior Court of Tattnall County: *Paul Crane v. E. B. Caldwell, Warden,* application for collateral re-

view of 1956 life sentence imposed upon conviction for murder, application served February 15, 1972, notification of filing pending.

19. Superior Court of Tattnall County: *Russell Mosely v. E. B. Caldwell, Warden,* Civil Action No. 72-2, application for collateral review of death sentence commuted to life imposed upon conviction for murder April 12, 1962, Superior Court of Screven County, pending.

20. Superior Court of Tattnall County: *Donald R. Stewart v. E. B. Caldwell, Warden,* collateral review of ten-year sentence imposed upon conviction of rape, July, 1971, Superior Court of Daugherty County, pending.

21. United States District Court, Southern District of Georgia, Waycross Division: *Evans v. Wofford, Warden,* Civil Action No. 776, application for collateral review of life sentence imposed upon conviction for murder November 20, 1970, Superior Court of Muscogee County, pending.

February 23, 1972.

CERTIORARI DENIED